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No. 08-873

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SUPREME COURT, U.S.

IN THE  
**Supreme Court of the United States**

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HERBERT GRUBB,

*Petitioner,*

*v.*

SOUTHWEST AIRLINES Co.,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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**BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the Court should entertain petitioner's hypothetical that *Meacham v. Knolls Atomic Power*, 128 S. Ct. 2395 (2008), abrogated *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), when this petition involves neither case.
2. Whether the Court should resolve a circuit split as to the proper burden allocation in Family and Medical Leave Act ("FMLA") interference cases, when the burden more favorable to petitioner was applied in this case.
3. Whether the Court should re-visit the already resolved issue of burden allocation for a reasonable accommodation claim under the Americans with Disabilities Act ("ADA"), when petitioner failed to show he is a qualified individual with a disability.

**RULE 29.6 CORPORATE DISCLOSURE  
STATEMENT**

Respondent Southwest Airlines Co. has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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## STATEMENT OF THE CASE

### I. Factual Background

Petitioner Herbert Grubb was a Flight Crew Training Instructor for Southwest Airlines Co. ("Southwest"). Over an eighteen-month period, he repeatedly fell asleep while training pilots, while working at his computer, and while attending mandatory instructor meetings. He also failed to show up for work and was tardy on numerous occasions. Southwest gave Grubb a written warning that Southwest would suspend him if this behavior continued. Grubb again fell asleep while training pilots, and Southwest again counseled him. Grubb improved for a short time period, but he again began falling asleep and snoring loudly while training pilots, and he also had to be counseled about his poor hygiene. Southwest suspended Grubb for two weeks and warned him failure to improve his behavior could lead to termination of his employment.

When he returned from suspension, Grubb fell asleep again, and Southwest counseled him again. Grubb then said he was thinking about seeing a specialist. Southwest removed Grubb from the training schedule for the rest of the month and offered him time off to resolve his problem. Grubb did not take Southwest up on its offer. When Grubb continued falling asleep, Southwest requested a fact finding meeting to consider more severe disciplinary action. Grubb then requested three weeks off to participate in a sleep program. Southwest allowed him to take the time off and canceled the fact finding meeting. Upon returning to work, Grubb continued to fall asleep. Showing no improvement,

Southwest decided to terminate Grubb. Southwest held a fact finding meeting pursuant to a collective bargaining agreement and thereafter terminated Grubb.

Not until after the fact finding meeting did Grubb request FMLA leave, but at the time of his termination, the decision-makers did not know he had applied. At no time, however, did Grubb ever provide adequate medical documentation certifying the need for him to take FMLA leave. In fact, one doctor indicated that Grubb did not have a serious health condition. He also never requested an accommodation for any alleged disability, much less gave any indication that he had a disability.

## II. Procedural Background

Grubb brought four claims against Southwest. First, he alleged Southwest terminated him in violation of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2612(a)(1)(D). Grubb did not specify whether he was claiming Southwest interfered with his FMLA rights under 29 U.S.C. § 2615(a)(1) ("FMLA interference"), or retaliated against him for requesting FMLA leave under 29 U.S.C. § 2615(a)(2) ("FMLA retaliation").<sup>1</sup> Second, Grubb alleged Southwest terminated him and refused to reasonably accommodate his sleep problem, allegedly "sleep apnea," in violation

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<sup>1</sup> Courts use the terms FMLA "interference" and "entitlement" interchangeably, and FMLA "discrimination" and "retaliation" interchangeably. See, e.g., *Killian v. Yorozu Auto. Tenn., Inc.*, 454 F.3d 549, 555 (6th Cir. 2006). For purposes of this brief, Southwest uses FMLA "interference" and FMLA "retaliation."

of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112.<sup>2</sup> Grubb did not specify whether he was claiming ADA discrimination or failure to accommodate. Third, Grubb alleged Southwest terminated him to interfere with his pension rights in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1140. Fourth, Grubb alleged Southwest wrongfully terminated him to avoid paying him his pension in violation of state law.

Southwest sought summary judgment on all of Grubb's claims. Southwest argued Grubb could not establish a FMLA interference claim because he had a long history of behavioral problems and did not have a serious health condition. Southwest also argued Grubb could not establish a *prima facie* case of FMLA retaliation, and it terminated Grubb for the legitimate, non-discriminatory reason that he repeatedly fell asleep at work, and not because he requested FMLA leave. Southwest argued Grubb could not establish an ADA reasonable accommodation claim because Grubb did not have a disability, Grubb could not perform the essential functions of his job with or without an accommodation, and his suggested accommodation was unreasonable. On the ADA discrimination claim, Southwest argued that it terminated Grubb for the legitimate, non-discriminatory reason that he repeatedly fell asleep at work, and not because he allegedly had sleep apnea. Finally, Southwest argued ERISA preempted Grubb's state law claims, and Grubb failed to show specific intent to interfere with his ERISA benefits.

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<sup>2</sup> Grubb did not mention he had sleep apnea until he filed his complaint.

In response, Grubb only addressed his FMLA claim. For the first time, he claimed he not only had sleep apnea, but also suffered from morbid obesity, which he argued in combination, constituted a serious health condition. Although he mentioned both FMLA interference and retaliation claims, he only argued FMLA retaliation.

Southwest's reply pointed out Grubb's failure to address his ADA, ERISA, and state law claims. Grubb then filed a two-page supplemental memorandum. Grubb argued that he had an absolute right to not be terminated upon requesting FMLA leave, and that he met the ADA's definition of disabled because no jobs existed "where he would be permitted to nod off while on the job."<sup>3</sup> He also argued Southwest could have accommodated him by changing his work shift. He again did not clarify if he was making an ADA accommodation or ADA discrimination claim.

The district court, in an unpublished opinion, granted summary judgment in favor of Southwest on all claims. (Pet. App. at 36a.) The court assumed *arguendo* that Grubb had a disability under the ADA, but found he was not qualified because he could not perform the essential functions of his job with or without a reasonable accommodation, and noted Southwest satisfied its accommodation duty. (Pet. App. at 29a.) The

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<sup>3</sup> Like his FMLA claim, Grubb's ADA claim has been a moving target. First he had a sleep problem, then he had sleep apnea, then he had a heart condition, and then he had sleep apnea combined with morbid obesity. Similarly, he claimed he was precluded from the major life activity of lifting, then it was working, talking, flying, and driving, and then it was sleeping.

court then used the *McDonnell Douglas* burden-shifting analysis and found that Grubb could not show his termination was a pretext for disability discrimination. (Pet. App. at 29a-31a.) Addressing Grubb's FMLA claim, the court found that Grubb failed to make out a *prima facie* case of FMLA retaliation because the only evidence he presented was "the timing of his termination and the filing of his FMLA claim," and found he could not refute that Southwest terminated him due to his behavior of falling asleep. (Pet. App. at 32a-33a.) The district court therefore granted summary judgment on Grubb's ADA and FMLA claims, and also went on to grant summary judgment on Grubb's ERISA and state law claims.

Grubb filed a motion to alter or amend the judgment. He claimed the district court erroneously used the *McDonnell Douglas* framework to analyze his FMLA interference claim or ignored it altogether. The court summarily denied the motion. (Pet. App. at 17a.)

The Fifth Circuit affirmed in a per curiam, unpublished opinion.<sup>4</sup> (Pet. App. at 16a.) Grubb claimed he had alleged FMLA interference and ADA reasonable accommodation only, and therefore, the district court should not have used *McDonnell Douglas*.<sup>5</sup> Nevertheless, Grubb argued he presented enough evidence to survive summary judgment on a FMLA retaliation claim.<sup>6</sup> The Fifth Circuit disagreed.

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<sup>4</sup> Unpublished Fifth Circuit opinions have no precedential value. 5TH CIR. R. 47.5.4.

<sup>5</sup> Grubb did not appeal the dismissal of his ERISA or state law wrongful termination claims.

<sup>6</sup> Grubb continued to insist that his ADA claim was only for accommodation.

The Fifth Circuit analyzed claims for both FMLA interference and FMLA retaliation. The court found a fact issue may have existed as to whether Grubb had a serious health condition, and therefore he arguably may have made out a *prima facie* case of FMLA retaliation. (Pet. App. at 13a.) However, his retaliation claim still failed because he could not show requesting leave was a reason for his firing. (Pet. App. at 14a.) His FMLA interference claim likewise failed because, as the court stated, an employee who requests FMLA leave is not afforded greater rights than if he had not requested leave, and “for purposes of the FMLA—if not the ADA—one can be fired for poor performance even if that performance is due to the same root cause as the need for leave.” (Pet. App. at 15a-16a.)

On the ADA accommodation claim, the court assumed *arguendo* that Grubb had a disability, but found he was not qualified because he could not perform the essential functions of his job with or without a reasonable accommodation. The court also found that Southwest satisfied any reasonable accommodation duty it might have owed. (Pet. App. at 8a-10a.) The court deemed the ADA discrimination claim waived because Grubb insisted he did not bring that claim. As such, the Fifth Circuit affirmed the district court’s grant of summary judgment in its entirety. (Pet. App. at 16a.)

Grubb then filed this petition for writ of certiorari, which is limited to his FMLA interference and ADA reasonable accommodation claims. In it, Grubb relies on wholly inapposite case law, misrepresents the lower courts’ opinions, and creates the illusion of a circuit split where none exists. For these reasons, as more fully set forth below, the Court should not grant certiorari.

## REASONS FOR DENYING THE PETITION

No compelling reason exists for the Court to grant certiorari. There is nothing special about this case. It involves typical FMLA/ADA claims with no grand issues worthy of Supreme Court review. It is highly fact specific, based on petitioner's ever-changing allegations, and has no legal significance—so much so that neither the district court nor the Fifth Circuit thought it worthy of publishing.

The bottom line is that Southwest fired Grubb for sleeping on the job and being absent and tardy over an eighteen-month period, despite numerous warnings to resolve his issues. His eleventh hour FMLA and ADA allegations did not arise until after Southwest had already made the decision to terminate him. He has never shown he has a serious health condition or a disability. Essentially, what Grubb wants is for the Court to require employers to not only allow, but also provide accommodations for, employees to sleep on the job without repercussions. Nothing in the ADA, the FMLA, or case law allows such a bizarre result. The Court should therefore deny the petition for writ of certiorari.

### **I. Neither the Decision Below Nor the Factual Record Rests on *Meacham* or *McDonnell Douglas*.**

Grubb claims the Court repudiated the well-established *McDonnell Douglas*<sup>7</sup> burden-shifting analysis in *Meacham v. Knolls Atomic Power*, 128 S. Ct.

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<sup>7</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

2395 (2008). *Meacham* has nothing to do with *McDonnell Douglas*, and neither case has anything to do with the claims at issue in this petition. Indeed, the Fifth Circuit did not even apply *McDonnell Douglas* analysis to Grubb's FMLA interference or ADA reasonable accommodation claims. Further, the Court does not have the benefit of the judicial analysis of *Meacham*'s effect, if any, on *McDonnell Douglas* because neither the Fifth Circuit nor any other courts have considered this argument.

**A. *Meacham* and *McDonnell Douglas* are irrelevant.**

*Meacham* did not repudiate or otherwise affect *McDonnell Douglas*. *Meacham* was a disparate impact case analyzing the specific statutory construction of a specific defense listed in the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621. The Court considered whether the "reasonable factor other than age" ("RFOA") exception to age discrimination constitutes an affirmative defense on which the employer bears the burden of persuasion. *Meacham*, 128 S. Ct. at 2401. The Court concluded that Congress intended RFOA to be an affirmative defense because it is an exception to "otherwise prohibited" age discrimination, plus RFOA is set forth in an entirely different section of the ADEA. *Id.* at 2400.

In contrast, *McDonnell Douglas* is an evidentiary burden-shifting framework used in disparate treatment cases. *McDonnell Douglas* is not used to evaluate affirmative defenses and is not an exception set forth in any statute. *Meacham* therefore has no impact on

*McDonnell Douglas*. Indeed, *Meacham* does not even mention *McDonnell Douglas*—not even in passing.<sup>8</sup> The Court also gave no indication that it intended *Meacham* to repudiate *McDonnell Douglas*. The Court likewise made no broad pronouncements as to congressional intent, as Grubb contends, much less any pronouncements on the FMLA or ADA provisions at issue in this case. Likewise, Congress has not indicated an intent to repudiate *McDonnell Douglas*. Certainly, Congress has had sufficient time to pass legislation overturning or modifying *McDonnell Douglas* if in fact it is inconsistent with congressional intent.

In any event, neither *Meacham* nor *McDonnell Douglas* has anything to do with this petition. *Meacham* involved disparate impact. *McDonnell Douglas* involved disparate treatment. This petition, as conceded by Grubb, involves neither. Rather the petition involves claims of ADA reasonable accommodation and FMLA interference. Further, neither the ADA reasonable accommodation nor the FMLA interference provisions contain the “otherwise prohibited” language at issue in *Meacham*. As the Court explained, “Congress understands the [otherwise prohibited] phrase . . . as a clear signal that a defense to what is ‘otherwise prohibited’ is an affirmative defense, entirely the responsibility of the party raising it.” *Meacham*, 128 S. Ct. at 2402. Grubb does not contend that “otherwise prohibited” language is at issue in this case. Because Congress did not include this language in the ADA or

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<sup>8</sup> Grubb even admitted to the Fifth Circuit that *Meacham* does “not directly address” the *McDonnell Douglas* burden-shifting protocol.

the FMLA, *Meacham* is wholly inapposite. See, e.g., *id.* at 2405 (noting that *Smith v. City of Jackson*, 544 U.S. 228 (2005) “could not have had the [RFOA] clause in mind as ‘identical’ to anything in Title VII . . . for that statute has no like-worded defense”).

The effect, if any, *Meacham* may have on *McDonnell Douglas*, is irrelevant to this case because the Fifth Circuit did not even use *McDonnell Douglas* burden-shifting analysis to evaluate Grubb’s ADA reasonable accommodation or FMLA interference claims. The Fifth Circuit evaluated Grubb’s FMLA claims as if he had “appeal[ed] the denial of his [FMLA] claim on both retaliation and entitlement grounds.” (Pet. App. at 11a, 15a.) The court, therefore, used the *McDonnell Douglas* framework to analyze the FMLA retaliation claim, and then conducted a completely different, non-*McDonnell Douglas*, analysis for Grubb’s FMLA interference claim. The portion of the Fifth Circuit’s opinion Grubb cites in his petition comes from the analysis of the retaliation claim, not the interference claim. (See Pet. at 14-15.) The Fifth Circuit also did not apply *McDonnell Douglas* on Grubb’s ADA claim. The court specifically stated that Grubb waived his ADA discrimination claim by asserting he never brought one. Therefore, the court did not use *McDonnell Douglas* at all on the claims at issue in this petition.

**B. The courts have not analyzed the impact of *Meacham* on *McDonnell Douglas*.**

Even if *Meacham* has an impact on *McDonnell Douglas*, this case is not the proper vehicle for the Court to consider its effect. No lower court, including the courts in this case, has considered the issue. Grubb did not raise *Meacham* until after the parties completed briefing before the Fifth Circuit. Even then, he filed a short letter simply stating, "While not directly addressed in *Meacham*, it would appear that the *McDonnell Douglas* . . . burden shifting framework . . . has been inferentially abrogated."<sup>9</sup> Southwest responded that *Meacham* was inapplicable. The Fifth Circuit did not request additional briefing from the parties and did not address *Meacham* at all in its opinion.

In addition, no other court has addressed whether *Meacham* impacts *McDonnell Douglas*. The Court only recently decided *Meacham* less than a year ago. Therefore, the lower courts have not had an opportunity to fully analyze *Meacham*, much less consider its impact, if any, on *McDonnell Douglas*. As such, this argument is not ripe for the Court's consideration.

**II. This Case Is a Poor Vehicle for Resolving Any FMLA Circuit Split.**

This case is a poor vehicle for resolving any circuit split on FMLA interference claims. The Court would

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<sup>9</sup> Grubb raised the issue in a Rule 28(j) letter, which is not the proper method to raise a new argument. See FED. R. CIV. P. 28(j); *Spiegla v. Hull*, 481 F.3d 961, 964-65 (7th Cir. 2007).

never reach the FMLA circuit split because Grubb never created a fact issue that he was entitled to leave, or that the decision-makers knew he applied for FMLA leave. Moreover, the Fifth Circuit applied the FMLA law of the circuits more favorable to Grubb. His FMLA claims did not survive summary judgment under more favorable case law, *a fortiori*, his FMLA claim cannot survive under less favorable case law. In any event, Grubb waived this circuit split argument by not raising it in the lower courts.

**A. The Court would never reach the FMLA circuit split.**

Grubb correctly asserts that a circuit split exists, but that split has no impact on the outcome of this petition. The circuit split involves the proper burden allocation in FMLA interference claims. The circuits agree that the employee initially bears the burden of proving he was entitled to take FMLA leave. *See, e.g., Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 963-64 (10th Cir. 2002); *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1017 (7th Cir.), *cert. denied*, 531 U.S. 1012 (2000). However, the circuits are split as to who bears the burden of proving whether or not the employee would have been terminated had he not requested leave. The Sixth and Seventh Circuits take the position that the *employee* must prove he would not have been terminated if he had not requested or taken FMLA leave. *See Moorer v. Baptist Mem'l Health Care Sys.*, 398 F.3d 469, 488-89 (6th Cir. 2005); *Rice*, 209 F.3d at 1018. The Fifth, Eighth, Tenth, and Eleventh Circuits take the opposite position and place the burden on the *employer* to prove the employee would have been

terminated regardless of his FMLA leave request. See *Grubb v. Southwest Airlines*, 296 Fed. Appx. 383, 391 (5th Cir. 2008); *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 979 (8th Cir. 2005); *Smith*, 298 F.3d at 963-64; *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1354 (11th Cir. 2000).

The Court would never reach this FMLA circuit split because Grubb presented no summary judgment evidence to satisfy his initial burden of proving that he was entitled to take FMLA leave. Southwest provided evidence that when Grubb asked about the possibility of FMLA leave, he was not seeking inpatient care. See 29 U.S.C. § 2611(11). Nor did Grubb have a condition requiring continuing treatment that rendered him unable to work for more than three consecutive calendar days. See 29 C.F.R. § 825.114(a)(2). Grubb never provided the medical certification required, nor did a doctor ever recommend that Grubb take FMLA leave. To the contrary, Grubb's doctor completed a medical form indicating that Grubb did not have a serious health condition. In response, Grubb provided no evidence whatsoever that he had a serious health condition. Because Grubb could not create an issue of fact on his initial burden, the Court would never reach the circuit split on the appropriate burden allocation for FMLA interference claims.

**B. The Fifth Circuit applied the circuit law more favorable to Grubb.**

The Court would also not reach the circuit split because the Fifth Circuit applied law from the side of the circuit split that is more favorable to Grubb. Grubb

incorrectly claims the court below followed the Seventh Circuit's decision in *Rice* and placed the burden on him to show he would not have been terminated had he not requested leave. Grubb argues the court below should have followed the Tenth Circuit and put the burden on Southwest to show that it would have terminated Grubb regardless of his requesting FMLA leave. The Fifth Circuit did in fact apply the Tenth Circuit's rationale. The Fifth Circuit specifically relied on and quoted from case law providing that an employer is not liable for FMLA interference "if the *employer* can prove it would have made the same decision had the employee not exercised the employee's FMLA rights." (Pet. App. at 15a-16a (emphasis added).) The language the court quoted is from the Eighth Circuit case, *Throneberry*, which adopted the Tenth Circuit's reasoning. See *Throneberry*, 403 F.3d at 979 ("We find the Tenth Circuit's reasoning in *Smith [v. Diffie Ford-Lincoln-Mercury, Inc.]*, 298 F.3d 955 (10th Cir. 2002)] relating to interference claims convincing.").

Placing the burden on Southwest, the Fifth Circuit found that Grubb's termination was proper. (Pet. App. at 16a.) Southwest's summary judgment evidence established that it would have terminated Grubb regardless of his request for FMLA leave. Grubb had an eighteen-month history of failing to show up for work, tardiness, and falling asleep while training pilots, all of which occurred before he requested FMLA leave. (Pet. App. at 19a.) Grubb was well aware that if he continued to fall asleep at work, he would be terminated. He received counseling, warnings, and a suspension, and he still continued to fall asleep. These facts are undisputed. Before the fact finding meeting, the

decision-makers already knew Southwest had no other option but to terminate Grubb, but they held the meeting nonetheless in order to comply with a collective bargaining agreement. Not only was the decision to terminate Grubb made before Grubb requested FMLA leave, but at the time of Grubb's termination, the decision-makers were not aware he had even requested leave. Grubb met with Southwest's FMLA coordinator, who was in a department separate and apart from the decision-makers. (Pet. App. at 5a, 24a.) Grubb offered no evidence to the contrary. (Pet. App. at 5a.) Therefore, Grubb failed to create an issue of fact because he presented no evidence whatsoever to refute that Southwest would have terminated him regardless of his leave request.

Because the Fifth Circuit placed the burden on Southwest, Grubb received the benefit of the lower burden, and therefore Grubb was not aggrieved by the circuit split. Given that Grubb's FMLA interference claim did not survive summary judgment with the burden on Southwest, the claim certainly could not have survived summary judgment with the burden on Grubb. Therefore, irrespective of who bears the burden of proof, Grubb's claim would still fail, and the Court would never reach the circuit split.

**C. Grubb waived the FMLA circuit split argument.**

Grubb waived the FMLA circuit split argument by raising it for the first time in his petition for writ of certiorari. In the district court, Southwest outlined the burden allocation under which to evaluate FMLA

interference claims, and placed the burden on Southwest to show it would have made the same decision had Grubb not requested FMLA leave. Grubb did not refute this in his response brief, nor would it have made sense for Grubb to ask the court to shift the burden onto him. Grubb also did not bring up the circuit split in his summary judgment supplemental brief, or before the Fifth Circuit, despite Southwest addressing the issue again. Moreover, in both the district court and Fifth Circuit briefing, Grubb failed to cite even one case on burden allocation, much less the Tenth Circuit case upon which he now relies, or to even address the cases cited by Southwest.

In fact, Grubb's complete failure to bring the circuit split to the Fifth Circuit's attention may have been one of the reasons the court chose not to publish the opinion. See 5TH CIR. R. 47.5.1 (declining to publish opinions that involve "well-settled principles of law" or that do not "create or resolve[] a conflict of authority"). Because Grubb did not raise or ask the lower courts to resolve the circuit split, he has waived the circuit split argument.

### **III. No Circuit Split Exists on ADA Reasonable Accommodation Claims.**

Grubb claims a circuit split exists as to whether the *McDonnell Douglas* analysis applies in ADA failure to accommodate claims. This assertion is incorrect. Every circuit that has considered the issue, including the Fifth Circuit below, has adopted the Court's burden allocation, as most recently set forth in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). However, the Court would never reach the issue of whether a circuit split exists

because under both *McDonnell Douglas* and ADA accommodation analysis, Grubb still had to prove he was a qualified individual with a disability, which he could not do.

**A. Under any analysis, Grubb could not prove he was protected under the ADA.**

Under any ADA analysis, Grubb must first establish he is a "qualified individual" with a disability. See 42 U.S.C. § 12112. Southwest provided summary judgment evidence that Grubb was not disabled because he did not have an impairment and was not substantially limited in any major life activity. Grubb provided no evidence to establish his alleged disability, or any evidence that he was substantially limited in any major life activity. Indeed, Grubb did not even address his ADA claim in his response brief. It was not until after Southwest pointed out his failure to address his ADA claim, that he sought leave to file a supplemental brief to address his ADA claim. As to whether he had a cognizable disability, the only argument Grubb made in his supplemental brief is that Southwest "provided no evidence that Mr. Grubb could have performed any other job where he would be permitted to nod off while on the job." This smaller than a scintilla of evidence was insufficient to survive summary judgment.

Nevertheless, the Fifth Circuit assumed, without deciding, that Grubb had a covered disability, but found that he was not a "qualified individual" under the ADA. (Pet. App. at 8a-9a.) In doing so, the court relied on the ADA's definition that "[a] qualified individual with a disability means an individual with a disability who, with

or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8). Finding that Grubb’s alleged disability prevented him from being conscious and alert, a basic element of the performance of his job as a flight instructor, the Fifth Circuit correctly found he was not a qualified individual under the ADA. (Pet. App. at 9a); *see also Cannon v. Monsanto Co.*, 2008 U.S. Dist. LEXIS 6107, at \*12 (E.D. La. Jan. 25, 2008) (“Despite the factual dispute concerning whether sleep apnea constitutes a disability, the fact that the sleep apnea caused [p]laintiff to sleep on the job removed ADA protection.”).

Grubb also failed to meet the ADA’s standard for a qualified individual because he refused to manage his alleged sleep apnea. *See Amato v. St. Luke’s Episcopal Hosp.*, 987 F. Supp. 523, 530 (S.D. Tex. 1997) (“[N]o disabled person is ‘qualified’ if he needs accommodation precisely because he failed to manage an otherwise controllable disorder.”); *Siefken v. Vill. of Arlington Heights*, 65 F.3d 664, 666-67 (7th Cir. 1995) (finding that an employee has no claim under the ADA when he does not meet the employer’s legitimate job expectations as a result of failing to control his controllable disability). Southwest asserted in its summary judgment motion that Grubb repeatedly failed to seek help, failed to follow his doctor’s instructions, did not use his CPAP breathing machine as required to treat his sleep apnea, and never followed through with his doctor’s recommendation to properly recalibrate the machine. Accordingly, under any ADA analysis Grubb could not show he was a qualified individual with a disability, and the Court would never reach the issue of any alleged circuit conflict.

**B. No circuit has adopted *McDonnell Douglas* analysis for ADA accommodation claims.**

In any event, contrary to Grubb's assertion, no circuit split exists on whether to apply the *McDonnell Douglas* burden-shifting analysis to ADA reasonable accommodation claims.<sup>10</sup> To be sure, the circuits once wrestled with the appropriate burden allocation for ADA reasonable accommodation claims. *Jackan v. New York State Dep't of Labor*, 205 F.3d 562, 566 (2d Cir. 2000) ("Courts have struggled to define the appropriate burdens of persuasion when . . . an employee seeks relief on the ground that his employer failed to 'reasonably accommodate' his disability."). Courts now uniformly use the following framework for ADA reasonable accommodation claims: (1) the employee must prove that he has a disability; (2) the employee must prove he is a qualified individual, meaning that he can perform the essential functions of his job with or without an accommodation; and (3) the employee must show that a reasonable accommodation exists. If the employee meets this initial burden, then the employer bears the burden of proving that the proposed accommodation would pose an undue hardship, given the specific circumstances of the case. See, e.g., *Riel v. Electronic Data Sys. Corp.*, 99 F.3d 678, 681-84 (5th Cir. 1996); *Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir.), cert. denied sub nom., *Barth v. Duffy*, 511 U.S. 1030 (1994). In confirming this framework, the Court took notice that "[n]ot every court has used the same language, but their results are

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<sup>10</sup> Ironically, while arguing a circuit split exists, Grubb also argues that "[b]urden-shifting in reasonable accommodation cases has been widely repudiated." (Pet. at 21.)

functionally similar.” See *U.S. Airways*, 535 U.S. at 401-02. The Court, therefore, also recognizes the absence of a circuit split in analyzing ADA accommodation claims.<sup>11</sup>

The Fifth Circuit below used the same framework used by the Court and by the circuit courts when it granted summary judgment on Grubb’s ADA reasonable accommodation claim. (See Pet. App. at 9a-10a (citing *Jenkins v. Cleco Power, LLC*, 487 F.3d 309 (5th Cir. 2007); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997); *Rogers v. Int’l Marine Terminals, Inc.*, 87 F.3d 755 (5th Cir. 1996)).) The court assumed *arguendo* that Grubb was disabled, but found that he was not a qualified individual because he could not perform the essential functions of his job, namely remaining conscious and alert, with or without a reasonable accommodation.

Grubb also failed to create an issue of fact that a reasonable accommodation existed that would keep him from falling asleep while working. Grubb now claims a shift change would have been a reasonable accommodation, but Grubb never asked for a shift change. Regardless, Grubb presented no evidence that a shift change would have stopped him from sleeping on the job, and allowing him to sleep on the job during a different time of day would not have constituted a reasonable accommodation under the ADA.

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<sup>11</sup> The Fifth Circuit’s decision to not published its opinion further supports the absence of a circuit split. See 5TH CIR. R. 47.5.1 (declining to publish opinions that involve “well-settled principles of law” or that do not “create or resolve[] a conflict of authority”).

At most, Grubb's doctor suggested he try a schedule change to see if that might help him stop sleeping on the job. Nothing in the ADA, or the FMLA for that matter, requires an employer to assist in the experimental treatment of the symptoms of an alleged disability or an alleged serious health condition. Nor is an employer required to wait around for over eighteen months to see if something might keep an employee from falling asleep. As the Fifth Circuit noted, a "reasonable accommodation is by its terms most logically construed as that which presently, or in the immediate future, enables the employee to perform the essential function of the job." (Pet. App. at 10a (quoting *Rogers*, 87 F.3d at 759-60).) After eighteen months, Grubb was still unable to perform the essential functions of his job, and therefore no reasonable accommodation existed.

Southwest also presented summary judgment evidence that changing Grubb's schedule would not be reasonable because it would "impose inordinate burdens on other [Southwest] employees." (Pet. App. at 10a.) In response, Grubb provided no evidence to refute this or to otherwise show that changing his schedule would have been reasonable. Grubb is therefore incorrect that "the circuit court allowed Southwest to simply articulate an 'undue hardship' defense."

In an attempt to create the illusion of a circuit split, Grubb quotes from the district court's *McDonnell Douglas* analysis of what the district court believed was an ADA discrimination claim. (See Pet. at 20-21.) Grubb fails to make clear that the Fifth Circuit did not use *McDonnell Douglas* at all on his ADA claim. Instead, it specifically found that Grubb waived any ADA

discrimination claim by vehemently denying he had brought one. (Pet. App. at 10a.) Therefore, the Fifth Circuit only analyzed Grubb's ADA claim as a reasonable accommodation claim, and nowhere in its ADA analysis did the Fifth Circuit cite, much less rely on, the *McDonnell Douglas* burden-shifting framework.<sup>12</sup>

#### **IV. The FMLA Does Not Require an Employer to Tolerate Behavior that Interferes with an Employee's Job Performance.**

Grubb argues that the Fifth Circuit's analysis results in an employer being able to avoid liability under the FMLA by terminating an employee and merely articulating that the termination was due to poor performance. His argument boils down to his mistaken belief that an employee cannot be terminated for performance problems that stem from a FMLA-covered serious health condition. The circuits disagree with Grubb's argument. Rather, courts uniformly hold that an employee who requests FMLA leave is not completely immunized from adverse employment action. Specifically, "the FMLA does not protect an employee from performance problems caused by the condition for which FMLA leave is taken . . . ." *McBride v. Citgo Petroleum Corp.*, 281 F.3d 1099, 1108 (10th Cir. 2002) (noting that the employee alleged she was terminated because of performance problems related to her illness, not because she took FMLA leave). It is well-established that "an employee who requests FMLA leave would have no greater protection against his or her

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<sup>12</sup> In fact, the Fifth Circuit never cites *McDonnell Douglas* in any portion of its opinion.

employment being terminated for reasons not related to his or her FMLA request than he or she did before submitting the request." *Renaud v. Wyoming Dept. of Family Servs.*, 203 F.3d 723, 732 (10th Cir. 2000) (finding no FMLA interference where employee was terminated for performance reasons relating to his health condition after requesting FMLA leave). The courts reason that "[t]o limit an employer's ability to terminate an employee for performance issues simply because the employee requested medical leave would vest the employee with greater rights and benefits than she would have enjoyed had she continued working without requesting such leave." *Burton v. Buckner Children & Family Servs., Inc.*, 2003 U.S. Dist. LEXIS, at \*17-18 (N.D. Tex.), *aff'd*, 104 Fed. Appx. 394 (5th Cir. 2004), *cert. denied*, 543 U.S. 1050 (2005). Therefore, the FMLA does not require an employer to tolerate or accommodate the effects of an alleged serious health condition if the condition interferes with job performance.<sup>13</sup> The Fifth Circuit correctly held that Southwest could terminate Grubb for falling asleep on the job, even if his falling asleep was related to his alleged need to take FMLA leave. (Pet. App. at 16a.)

As to Grubb's claim that the Fifth Circuit granted summary judgment based on Southwest's mere articulation of performance issues, this is incorrect. As set forth in Section II.B above, the Fifth Circuit placed the burden on Southwest to show that it would have terminated Grubb even if he had not requested FMLA leave. Southwest met this burden, and Grubb failed to

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<sup>13</sup> Reasonable accommodation language only appears in the ADA, not the FMLA.

refute it. The Fifth Circuit properly affirmed summary judgment in Southwest's favor.

### CONCLUSION

For the foregoing reasons, Southwest respectfully asks the Court to deny Petitioner Herbert Grubb's Petition for a Writ of Certiorari.

Respectfully submitted,

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